UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIOT I. BERNSTEIN, et al., Plaintiffs, - against - APPELLATE DIVISION, FIRST DEPARTMENT DEPARTMENTAL DISCIPLINARY COMMITTEE, et al., Defendants.	07 Civ. 11196 (SAS) **NOTICE OF MOTION TO DISMISS**

PLEASE TAKE NOTICE THAT, upon the accompanying Declaration of Lili Zandpour in Support of Motion to Dismiss and the exhibits thereto, the accompanying Memorandum of Law of Foley & Lardner LLP, Steven C. Becker, Douglas A. Boehm, William J. Dick and Michael W. Grebe in Support of their Motion to Dismiss, and all prior pleadings in this action, defendants Foley & Lardner LLP, Steven C. Becker, Douglas A. Boehm, William J. Dick and Michael W. Grebe, by and through their undersigned counsel, will move this Court before the Honorable Shira A. Scheindlin, at the United States Court House, 500 Pearl Street, New York, New York 10007, for an order pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6) dismissing plaintiffs' original and amended complaints in their entirety as against them on the grounds that plaintiffs have failed to state a claim upon which relief may be granted and for lack of particularity. As per the schedule ordered by the Court, plaintiffs' response is due on June 30, 2008 and defendants' reply is due on July 14, 2008.

Dated: New York, New York
May 30, 2008

FRIEDMAN KAPLAN SEILER &
ADELMAN LLP

By: 

Kent K. Anker
Lili Zandpour
1633 Broadway
New York, NY 10019
(212) 833-1100

Attorneys for Defendants Foley & Lardner LLP, Steven C. Becker, Douglas A. Boehm, William J. Dick and Michael W. Grebe

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIOT I. BERNSTEIN, et al.,	:	
Plaintiffs,	:	07 Civ. 11196 (SAS)
- against -	:	**DECLARATION IN SUPPORT OF MOTION TO DISMISS**
APPELLATE DIVISION, FIRST DEPARTMENT DEPARTMENTAL DISCIPLINARY COMMITTEE, et al.,	:	
Defendants.	:	

LILI ZANDPOUR declares under penalty of perjury as follows:

1. I am a member of the bar of the State of New York and of this Court and an associate at the law firm of Friedman Kaplan Seiler & Adelman LLP, counsel for defendants Foley & Lardner LLP, Steven C. Becker, Douglas A. Boehm, William J. Dick and Michael W. Grebe. I submit this declaration in support of defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b).

2. Attached hereto as Exhibit A is a true and correct copy of a letter dated May 6, 2004 from Noel D. Sengel to P. Stephen Lamont and Eliot Bernstein.

Dated: May 30, 2008

Lili Zandour

Reply to Alexandria office:
100 N. Pitt Street
Suite 310
Alexandria, Virginia 22314-3133
Phone: (703) 518-8045
Fax: (703) 518-8052

Virginia State Bar

Eighth and Main Building
707 East Main Street, Suite 1500
Richmond, Virginia 23219-2800
Telephone: (804) 775-0500

Facsimile: (804) 775-0501 TDD: (804) 775-0502

May 6, 2004

PERSONAL AND CONFIDENTIAL

Mr. P. Stephen Lamont
Mr. Eliot Bernstein
Iviewit Holding, Inc.
Suite 801
10158 Stonehenge Circle
Boynton Beach, FL 33437

Re: In the Matter of William J. Dick, Esq.
VSB Docket # 04-052-1366

Dear Messrs. Lamont and Bernstein:

This letter is written in response to your complaint to the Virginia State Bar regarding the alleged unethical conduct of attorney William J. Dick. The preliminary investigation conducted by the Virginia State Bar fails to reveal evidence which would support a finding that Mr. Dick engaged in unethical conduct.

According to the information available to the Virginia State Bar, you are the CEO and President of IVIEWIT Holding, Inc. (IVIEWIT). You filed a lengthy complaint on behalf of INVIEWIT alleging that that Mr. Dick conspired with others at INVIEWIT and the law firm of Foley & Lardner (Foley) to deprive INVIEWIT of certain patent rights.

Mr. Dick, of counsel to Foley at the time of these events, responded denying your allegations against him and providing considerable documentation, including affidavits from several of the individuals named in your complaint, to support his position. From this documentation, it appears that your allegations against Mr. Dick and the others, over whom the Virginia Bar has no jurisdiction, are not true. Mr. Dick did not prepare or submit INVIEWIT's patent applications, and those who did so did not do so in such a manner as to deprive INVIEWIT of any rights to which it was entitled.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIOT I. BERNSTEIN, et al.,	:	
Plaintiffs,	:	07 Civ. 11196 (SAS)
- against -	:	
APPELLATE DIVISION, FIRST DEPARTMENT DEPARTMENTAL DISCIPLINARY COMMITTEE, et al.,	:	
Defendants.	:	

MEMORANDUM OF LAW OF FOLEY & LARDNER LLP, STEVEN C. BECKER, DOUGLAS A. BOEHM, WILLIAM J. DICK AND MICHAEL W. GREBE IN SUPPORT OF THEIR MOTION TO DISMISS

FRIEDMAN KAPLAN SEILER &
ADELMAN LLP
1633 Broadway
New York, New York 10019-6708
(212) 833-1100
Kent K. Anker
Lili Zandpour

Attorneys for Defendants Foley & Lardner LLP, Steven C. Becker, Douglas A. Boehm, William J. Dick and Michael W. Grebe

May 30, 2008

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 3

ARGUMENT 7

I. ALL OF PLAINTIFFS' CAUSES OF ACTION AGAINST THE FOLEY DEFENDANTS, WHETHER UNDER FEDERAL OR STATE LAW, ARE TIME-BARRED 8

A. Plaintiffs' Federal Claims Are Time-Barred 8

B. All of Plaintiffs' State Claims are Time-Barred 9

II. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED AGAINST THE FOLEY DEFENDANTS 11

A. Plaintiffs' RICO Allegations Fail to Meet the Predicate Acts Requirement, Show A Pattern of Racketeering, or State a RICO Enterprise 11

1. Plaintiffs Have not Alleged Any Predicate Acts Qualifying as Racketeering Activity 12

2. Plaintiffs Have not Alleged a Pattern of Racketeering Activity 14

3. Plaintiffs Have Not Alleged a RICO Enterprise 16

B. Plaintiffs' Remaining Federal Claims Are Also Deficient and Must be Dismissed 16

C. All of Plaintiffs' State Law Claims are Deficient and Must be Dismissed 18

1. Plaintiffs Fail To State a Claim for Common Law Fraud As They Neither Allege Scienter Nor Plead the Elements of Fraud with Particularity 18

2. Plaintiffs Fail to State Claims for Negligence/Malpractice or Breach of Contract Because They Do Not Allege Privity of Contract 19

3. Plaintiffs' Remaining State Law Claims are Similarly Deficient and Must be Dismissed 21

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

Cases

Achtman v. Kirby, Mcinerney & Squire, LLP,
336 F.Supp.2d 336 20

Amadsau v. Bronx Lebanon Hosp. Center,
03 Civ.6450 LAK AJP, 2005 WL 12174 9

Appalachian Enters., Inc. v. ePayment Solutions, Ltd.,
01 Civ. 11502 (GBD), 2004 WL 2813121 *7 (S.D.N.Y. Dec. 8, 2004) 11

Bell Atl. Corp. v. Twombly,
- - - U.S. - - -, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) 7, 17

Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs.,
996 F.2d 537 (2d Cir. 1993) 14, 15

Cofacredit, S.A. v. Windsor Plumbing Supply Co.,
187 F.3d 229 (2d Cir. 1999) 14

Davis v. Monahan,
832 So. 2d 708 (Fla. 2002) 10

Federal Ins. Co. v. North American Specialty Ins. Co.,
47 A.D.3d 52, 59 (1st Dep't 2007) 20

Fieger v. Pitney Bowes Credit Corp.,
251 F.3d 386 (2d Cir. 2001) 18

First Capital Asset Mgmt., Inc. v. Satinwood, Inc.,
385 F.3d 159 (2d Cir. 2004) 7, 16

Greene v. Berger & Montague, P.C.,
96 CIV. 9339 (SHS), 1998 WL 99574 17

Greene v. Hanover Direct, Inc., et. al.,
06 Civ. 13308 (NRB), 2007 WL 4224372 ..... 12, 13, 18, 19

Jones v. Nat'l Comm. and Surveillance Networks,
409 F. Supp. 2d 456 ..... 2, 7, 11

Kirk v. Heppt,
532 F. Supp. 2d 586 7

Lopez-Infante v. Union Cent. Life Ins. Co.,
809 So. 2d 13 (Fl. Dist. Ct. App. 3d Dist. 2002) 10

Martin-Trigona v. D'Amato & Lynch,
559 F. Supp. 533 (D.C.N.Y. 1983) 17

Medina v. Bauer,
02 Civ. 8837(DC), 2004 WL 136636 13

Mills v. Polar Molecular Corp.,
12 F.3d 1170 (2d Cir. 1993) 13, 18

Moss v. Morgan Stanley, Inc.,
719 F.2d 5 (2d Cir. 1983) 12

Nghiem v. U.S. Dept. of Veterans Affairs,
451 F. Supp. 2d 599 8

Nordwind v. Rowland,
04-9725 (LTS/AJP), 2007 WL 2962350 21

Pearl v. City of Long Beach,
296 F.3d 76, 79 (2d Cir. 2002) 9

Pridgen v. Andresen,
113 F.3d 391 (2d Cir. 1997) 4, 20

Radin v. Albert Einstein College of Medicine,
04 Civ. 704 (RPP), 2005 WL 1214281 8

Raven Elevator Corp. v. City of New York,
291 A.D.2d 355, 739 N.Y.S.2d 28 (1st Dept. 2002) 20

Robbat v. Gordon,
771 So. 2d 631 (Fl. Dist. Ct. App. 4th Dist. 2000) 10

Rogers v. Grimaldi,
875 F.2d 994 (2d Cir. 1989) 9, 18

Rosner v. Bank of China,
528 F. Supp. 2d 419 ..... 13, 14, 16

Ross v. FSG PrivatAir Inc.,
03 Civ. 7292 (NRB), 2004 WL 1837366 20

Segal v. Gordon,
467 F.2d 602 (2d Cir. 1972) 19

Spectrum Sports, Inc. v. McQuillan,
506 U.S. 447 (1993) 17, 18

Stuart v. American Cyanamid Co.,
158 F.3d 622 (2d Cir. 1998) 9

Technical Packaging, Inc. v. Hanchett,
2D06-3851, 2008 WL 1986930 *4 (Fl. Dist. Ct. App. 2d Dist. May 9, 2008) 11

Tenamee v. Schmukler,
438 F. Supp. 2d 438 19

United States v. Turkette,
452 U.S. 576 (1981) 16

World Wrestling Entertainment, Inc. v. Jakks Pacific, Inc.,
530 F. Supp. 2d 486 ..... 8, 11

Yusuf Mohamad Excavation, Inc. v. Ringhaver Equipment, Co.,
793 So. 2d 1127 (Fl. Dist. Ct. App. 5th Dist. 2001) 10

Zenith Radio Corp. v. Hazeltine Research Inc.,
401 U.S. 321, 338 (1971) 9

Statutes and Rules

15 U.S.C. § 15b 9

18 U.S.C. § 1341 12

18 U.S.C. § 1343 12

42 U.S.C. § 1983 17

Fed. R. Civ. P. 8 ..... 11, 22

Fed. R. Civ. P. 9(b) ..... *passim*

Fed. R. Civ. P. 12(b)(6) 1, 7, 8

Fed. R. Civ. P. 23.1 20

Fla. Stat. Ann. § 95.11(West 2008) 10

N.Y. CPLR 202 9

N.Y. CPLR 213(2) 10

N.Y. CPLR 213(8) 10

Defendants Foley & Lardner LLP ("Foley"), Steven C. Becker, Douglas A. Boehm, William J. Dick, and Michael W. Grebe (collectively, the "Foley Defendants") respectfully submit this memorandum of law in support of their motion to dismiss plaintiffs' original and amended complaints pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6).

PRELIMINARY STATEMENT

Pro se plaintiffs Eliot I. Bernstein, individually, and P. Stephen Lamont (both allegedly on behalf of certain shareholders and patent holders), filed their original complaint in this Court on December 12, 2007.[1] That complaint contained nothing but conclusory allegations against more than thirty-five defendants, including the Foley Defendants, and asserted claims under the U.S. Constitution's Patent Clause, the Sherman Act, sections of Title 18 of the U.S. Code and the federal civil RICO statute. Plaintiffs alleged that "defendants" participated in a broad conspiracy to deprive them of certain intellectual property through a RICO enterprise that included efforts to manipulate the court system and the attorney disciplinary process.

On April 14, 2008, the Court granted plaintiffs' request to file an amended complaint, which was to include claims against many new defendants. The Court ordered it be filed on May 10, 2008, and that defendants' deadline to move or file an answer was ordered to be May 30, 2008. On May 9, 2008, defendant Proskauer Rose LLP ("Proskauer") requested that service of the Amended Complaint be stayed as to any new defendant until after defendants' motions to dismiss. In response, the Court ruled that "service of any amended complaint should be stayed until such time as the scheduled motions to dismiss have been decided." Plaintiffs

---

[1] The original complaint is Docket No. 1 and the Amended Complaint ("AC") is Docket No. 62. As both are voluminous and in the court file, the Foley Defendants have not submitted additional copies to the Court as exhibits.

filed their Amended Complaint on May 12, 2008, and delivered a copy to defendants. In light of the Court's April 14 order, the Foley Defendants' arguments below are directed to the allegations of the Amended Complaint against the previously served defendants, but the arguments apply with even greater force to the patently deficient original complaint, which contained no specific factual allegations.

Plaintiffs' Amended Complaint names many new defendants and includes hundreds of paragraphs of statutes allegedly violated. While plaintiffs' original complaint was devoid of any detail, plaintiffs' Amended Complaint is nothing more than a "mass of verbiage." *Jones v. Nat'l Comm. and Surveillance Networks*, 409 F. Supp. 2d 456, 464 (S.D.N.Y. 2006). It does not state any "plausible" cause of action against the Foley Defendants, nor does it provide the particularity necessary for all claims, especially claims such as fraud and RICO. Therefore, it should be dismissed. The Amended Complaint rarely differentiates among defendants and does not allege what claim applies to which one of the hundreds of defendants; nor does it allege which plaintiff holds which claim.

Plaintiffs allege the Foley Defendants filed fraudulent patent applications, but also allege that Foley's retention ended in 2001, making plaintiffs' claims time-barred. Plaintiffs allege a RICO conspiracy, but fail to allege specific predicate acts, a pattern of racketeering, or a RICO enterprise. Instead, plaintiffs rely on conclusory allegations, claim two national law firms are the enterprise, and list over 300 federal and state statutory and rule violations, with no detail with regard to which defendant committed which act or how the elements are satisfied. Plaintiffs' allegations of fraud fail to create a strong inference of scienter and lack the necessary particularity with regard to the Foley Defendants' alleged misrepresentations.

Plaintiffs also assert other causes of action against the Foley Defendants that are patently deficient, including claims under the U.S. Constitution, Title VII of the Civil Rights Act and the Sherman Act. But the Foley Defendants were not state actors, Title VII does not apply and plaintiffs do not allege any facts that define the relevant market or state any injury to competition.

In addition, plaintiffs assert claims for legal malpractice and negligence and breach of contract, apparently on behalf of the corporate entity that Foley once represented. But, *pro se* plaintiffs cannot assert claims on behalf of any corporation, which can only appear by counsel. Moreover, they do not allege that they were individually in an attorney-client relationship with the Foley Defendants. Plaintiffs' interference claims allege no actions by the Foley Defendants with regard to the transactions or contracts. Plaintiffs provide no facts supporting their misappropriation or conversion claims. Finally, they assert "other civil" New York, Florida, and Delaware claims but their allegations are so broad as to be meaningless or are subsumed in their other claims.

This Court should end Mr. Bernstein's misguided campaign against the Foley Defendants. His reckless accusations against some of this country's premier law firms and this state's esteemed legal institutions should be dismissed.

STATEMENT OF FACTS[2]

Plaintiff Eliot I. Bernstein claims to be "[f]ounder and principal inventor of the technology of the Iviewit Companies." (AC ¶ 11.) Plaintiff P. Stephen Lamont is alleged to be "the former Chief Executive Officer (Acting) of the Iviewit Companies."[3] (AC ¶ 12.)

---

[2] For the purposes of this motion only, the Foley Defendants treat the facts alleged in the Amended Complaint as true but do not admit to their truth.

The Foley Defendants are: Foley & Lardner LLP, a national law firm based in Milwaukee, and its "partners, associates, and of counsel from 1998 to the present" (AC ¶ 64); William J. Dick, formerly of counsel to Foley (AC ¶ 66); Douglas A. Boehm, a former partner (AC ¶ 72); Steven C. Becker, a current partner at the firm (AC ¶ 73); and Michael W. Grebe, a former partner. (AC ¶ 65.) Other defendants include law firms and lawyers, judges and government officials in three states, attorney disciplinary bodies, patent pools, and corporations. (AC ¶¶ 25-63; 74-206.)

Plaintiffs allege that "on or about 1997, Iviewit's founder, plaintiff Eliot I. Bernstein, and other [non-party] inventors created inventions" allegedly "pertaining" to "profound shifts from traditional techniques in video and imaging" (AC ¶ 240) that require royalties from the makers and users of many technologies using "Digital Zoom" and "Scaled Video" including cable, the Internet, broadband, and chip design. (AC ¶ 244.)

Plaintiffs further allege that "on or about 1998" Bernstein and the Iviewit Companies retained Proskauer, Kenneth Rubenstein and Raymond Joao to review and procure intellectual property for "a number of the inventions pertaining to digital video and imaging." (AC ¶¶ 252, 254-55, 261.) Mr. Rubenstein is allegedly the patent "gatekeeper" for the MPEGLA LLC patent pool and Proskauer allegedly provided corporate services, oversaw Iviewit's patent applications, formed intellectual property ("IP") pools and brought in other companies to review the technology. (AC ¶¶ 255, 259-63, 269, 271, 276-81.)

---

[3] Plaintiffs also claim to bring this action on behalf of certain shareholders of the Iviewit Companies and certain patent holders. The Iviewit Companies include Iviewit Holdings Inc., Iviewit Technologies, Inc., Uview.com, Inc., Iview.com, Inc., I.C., Inc., Iviewit.com LLC, Iviewit LLC, Iviewit Corporation and Iviewit, Inc. (AC ¶¶ 13-24.) But as *pro se* plaintiffs, they may not bring an action on behalf of a corporation or a derivative shareholder action. *Pridgen v. Andresen*, 113 F.3d 391, 393 (2d Cir. 1997).

Iviewit then met with Boehm, Becker, Proskauer lawyers, and others, to correct the alleged problems "only days" before Foley was to file the patent applications. (AC ¶¶ 330-33.) Foley and Proskauer allegedly committed to correct them but filed the applications "fraudulently." (AC ¶ 331, 335.) In 2001, the Iviewit Companies terminated their relationship with Proskauer and Foley. (AC ¶ 252, 345-346.)

Plaintiffs' allegations of events following Foley's dismissal are conclusory. (AC ¶ 335-344; 350-423; 425; 443-492; 522-718.) Plaintiffs allege a vast "cover-up" conspiracy involving the Proskauer law firm, the judges of the First and Second Departments of the New York state courts, and the state bars of Florida and Virginia, and include no specific acts by the Foley Defendants other than a conclusory allegation that Mr. Dick "fixed" an action in Florida – along with others – and that the conspiracy was designed to benefit Mr. Dick. (AC ¶¶ 423; 543-718; 733 ¶¶ E, F.) The plaintiffs allege they asserted a complaint against Mr. Dick in October 2003, for "his part in theft of the IP" and alleged professional misconduct. (AC ¶¶ 695-698.) The Virginia Bar, upon review of the record before it, decided to take "no further action with regard to [plaintiffs'] complaint" against Mr. Dick because it found that plaintiffs' allegations "are not true" and that "the evidence available shows [Mr. Dick] did not engage in the misconduct questioned or alleged." (*See* Zandpour Dec. Ex. A.) Plaintiffs allege that this finding makes the Virginia State Bar part of the conspiracy and further allege that Mr. Dick made false statements to the Virginia State Bar. (AC ¶¶ 518; 692-701; 706-707.)

Plaintiffs' RICO Statement states the "enterprise" is Proskauer and Foley and that all other named defendants acted through them, using the law firms' "legal acumen." (AC ¶ 739, xii.) Plaintiffs allege the enterprise conspired through IP pools and contract violations, but allege no connection by Foley to those pools or contracts. (AC ¶ 744.) Plaintiffs allege no specific

benefit to Foley from the alleged "enterprise." (AC ¶ 746.) Rather than alleging specific predicate acts, plaintiffs list over two hundred fifty paragraphs citing sections of federal law, patent rules, Delaware, New York and Florida law allegedly violated by "defendants," but with only conclusory allegations regarding the elements or the Foley Defendants' actions. (AC ¶¶ 750-1066.) Finally, plaintiffs allege that they have suffered " a total loss of their IP for almost 10 years." (AC ¶ 742 ¶ A.)

ARGUMENT

On a motion pursuant to Rule 12(b)(6), the court "must accept as true all of the factual allegations contained in the complaint," and construe the complaint in the light most favorable to the plaintiff. *Bell Atl. Corp. v. Twombly*, - - - U.S. - - -, 127 S. Ct. 1955, 1975, 167 L. Ed. 2d 929 (2007) (citation and quotation marks omitted). However, "formulaic recitation of the elements of a cause of action" will not suffice; a plaintiff must provide more than "labels and conclusions" (*id.* at 1964-65) and "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974. *Pro se* plaintiffs are "not exempt from the relevant rules of procedural and substantive law, including pleading standards outlined in the Federal Rules of Civil Procedure." *Kirk v. Heppt*, 532 F. Supp. 2d 586, 590 (S.D.N.Y. 2008) (internal citations omitted); *Jones*, 409 F. Supp. 2d at 464 (pleading rules (as applied to a *pro se* plaintiff) seek to avoid "an unjustified burden" on the parties because they are "forced to select the relevant material from a mass of verbiage.") (internal citations omitted). In addition, all claims sounding in fraud, including RICO predicate acts, must be pled with particularity. Fed. R. Civ. P. 9(b); *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 178 (2d Cir. 2004). The Foley Defendants respectfully submit that the original complaint and the Amended Complaint should be dismissed in their entirety as against them with no further leave to replead.

I.
ALL OF PLAINTIFFS' CAUSES OF ACTION AGAINST THE FOLEY DEFENDANTS, WHETHER UNDER FEDERAL OR STATE LAW, ARE TIME-BARRED

A motion to dismiss on statute of limitations grounds is treated as a motion to dismiss pursuant to Rule 12(b)(6), without resort to summary judgment procedures, where the defense appears on the face of the complaint (filed here on December 12, 2007). *See Nghiem v. U.S. Dept. of Veterans Affairs*, 451 F. Supp. 2d 599, 602-603 (S.D.N.Y. 2006) (citations and quotations omitted). Plaintiffs' allegations against the Foley Defendants are limited to events during the course of Foley's retention as IP counsel to Iviewit, which plaintiffs allege did not extend beyond 2001. Moreover, plaintiffs' allege that following Foley's termination, Foley's replacement counsel allegedly began the "unearthing of a mass of crimes" and that plaintiffs have suffered a "total loss of their IP for almost 10 years." (AC ¶¶ 454; 742 ¶ A.) Therefore, plaintiffs were on notice of Foley's alleged bad acts in 2001 and thus, under the relevant limitations periods, all of their claims would have accrued no later than the end of 2001 and are time-barred.

A. Plaintiffs' Federal Claims Are Time-Barred

Plaintiffs' RICO claims are subject to a four-year limitations period. *Radin v. Albert Einstein College of Medicine*, 04 Civ. 704 (RPP), 2005 WL 1214281 *16 (S.D.N.Y. Mar. 20, 2005). The limitations period begins to run when plaintiff discovers or should have discovered its RICO injury. *Id.* "An injury is 'discoverable' when a plaintiff has constructive notice of facts sufficient to create a duty to investigate further into the matter," which here was as early as 2001. *See World Wrestling Entertainment, Inc. v. Jakks Pacific, Inc.*, 530 F. Supp. 2d 486, 525 (S.D.N.Y. 2007) (citation and internal quotations omitted). Moreover, plaintiffs'

alleged economic injuries are linked to the initial injuries they allegedly suffered when the applications were filed and cannot be extended. *Id.* at 527 (noting well-established principle that "the courts have refused to extend the life span of a RICO plaintiff's injuries when they merely involve subsequent costs associated with the initial injury.") (citations omitted). Accordingly, Plaintiffs' RICO claims are time-barred.

Similarly, plaintiffs' Sherman Act claims are also subject to a four year statute, *see* 15 U.S.C. § 15b, and accrued when the defendants committed an act that injured plaintiffs' business. *See Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 338 (1971). As explained above, plaintiffs were aware of any alleged injury resulting from Foley's alleged actions no later than 2001 and this claim is also time-barred. To the extent plaintiffs allege a continuing conspiracy, their allegations against the Foley Defendants are conclusory and insufficient. *Amadsau v. Bronx Lebanon Hosp. Center*, 03 Civ.6450 LAK AJP, 2005 WL 121746 *4 (S.D.N.Y. Jan. 21, 2005) (dismissing plaintiffs' claims, including antitrust claims and noting that "merely placing the word 'continuing' before a claim . . . [did] not cure a time-bar").

Finally, plaintiffs' constitutional claims against the Foley Defendants are subject to a three year limitation and are also time-barred. *See Pearl v. City of Long Beach*, 296 F.3d 76, 79 (2d Cir. 2002).

B. <u>All of Plaintiffs' State Claims are Time-Barred</u>

Plaintiffs' state claims are also time-barred. In a federal question case with pendent state claims, the forum state's choice of law rules with regard to statute of limitations apply. *Rogers v. Grimaldi*, 875 F.2d 994, 1002 (2d Cir. 1989). In New York, when a nonresident plaintiff sues upon a cause of action that arose outside of New York, the court must apply the shorter limitations period, including all relevant tolling provisions, of either New York's rule or the state where the cause of action accrued. N.Y. CPLR 202; *Stuart v. American*

Cyanamid Co., 158 F.3d 622, 626-627 (2d Cir. 1998). Here, plaintiff Bernstein is a nonresident and the events that give rise to plaintiffs' claims occurred in Florida, where the Iviewit companies were located. As such, since Florida has a shorter limitation period (see below), Florida's statutes of limitation apply.[4]

The limitations periods in Florida, for the relevant claims, are two years for legal malpractice (Fla. Stat. Ann. § 95.11(4)(a)(West 2008)), four years for negligence, tortious interference, misappropriation and conversion, and fraud (Fla. Stat. Ann. §§ 95.11(3)(a), (o), (p), (j)(West 2008)), and five years for breach of contract (Fla. Stat. Ann. § 95.11(2)(West 2008)). *Davis v. Monahan*, 832 So. 2d 708, 709, 712 (Fla. 2002) (misappropriation and conversion); *Yusuf Mohamad Excavation, Inc. v. Ringhaver Equipment*, Co., 793 So. 2d 1127, 1128 (Fl. Dist. Ct. App. 5th Dist. 2001) (tortious interference). The limitations period for malpractice begins to run from the time of injury and the limitation period for fraud runs from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence. *Robbat v. Gordon*, 771 So. 2d 631, 636 (Fl. Dist. Ct. App. 4th Dist. 2000) (time for legal malpractice claim runs when "it is reasonably clear that the client has actually suffered some damage from legal advice or services"); *Lopez-Infante v. Union Cent. Life Ins. Co.*, 809 So. 2d 13, 15 (Fl. Dist. Ct. App. 3d Dist. 2002) (setting out statute of limitation and accrual rule for

---

[4] Even if this Court applies New York's limitations period, plaintiffs' claims would be barred. The longest New York limitations period applicable to plaintiffs' state claims is six years for breach of contract accruing from date of breach, and for fraud, the later of six years from the date of the wrong, or two years from the date the fraud could have been discovered. N.Y. CPLR 213(2) (breach of contract); N.Y. CPLR 213(8) (fraud). It is clear from plaintiffs' pleadings that plaintiffs were on notice of the alleged wrongs during the course of Foley's retention, which did not extend beyond the end of 2001. Plaintiffs filed their complaint on December 12, 2007 and have not alleged any acts in the last two weeks of December 2001. Accordingly, even under New York's longer limitations period for fraud and breach of contract, plaintiffs' claims are time-barred.

fraud action). With regard to breach of contract, the limitation period begins to run at breach. *Technical Packaging, Inc. v. Hanchett*, 2D06-3851, 2008 WL 1986930 *4 (Fl. Dist. Ct. App. 2d Dist. May 9, 2008).

Here, plaintiffs were on notice of their injuries and the facts giving rise to their claims no later than the end of 2001. Because plaintiffs filed their original complaint in December 2007, all of plaintiffs' state claims are time-barred.

II.
PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED AGAINST THE FOLEY DEFENDANTS

Plaintiffs' Amended Complaint is nothing more than a "mass of verbiage," alleging violations of over 300 state and federal statutes without differentiating between the nearly 200 named defendants, and thus does not satisfy Rule 8, much less provide the necessary particularity under Rule 9(b). *See Jones*, 409 F. Supp. 2d at 464 (citing and quoting *Appalachian Enters., Inc. v. ePayment Solutions, Ltd.*, 01 Civ. 11502 (GBD), 2004 WL 2813121 *7 (S.D.N.Y. Dec. 8, 2004) (dismissing complaint naming seventeen defendants that generally referred to conduct of all defendants without differentiating conduct of particular defendants or describing how parties were interrelated). If this court finds plaintiffs' claims are timely, plaintiffs fail to state a claim for which relief may be granted in the Amended Complaint.

A. Plaintiffs' RICO Allegations Fail to Meet the Predicate Acts Requirement, Show A Pattern of Racketeering, or State a RICO Enterprise

"Civil RICO is an unusually potent weapon – the litigation equivalent of a thermonuclear device . . . [and] courts should strive to flush out frivolous RICO allegations at an early stage of the litigation." *World Wrestling Entertainment, Inc.*, 430 F. Supp. 2d at 495-496 (internal citations and quotations omitted). This is just such a case. Notwithstanding plaintiffs' lengthy allegations (AC ¶¶ 750-1066), plaintiffs have failed to meet their pleading burden for

their civil RICO claims against the Foley Defendants. Plaintiffs allege that the Foley Defendants violated each of the four subsections of the RICO statute. (AC ¶ 739 ¶ i.) But, other than conclusory allegations, plaintiffs have not alleged sufficient facts to sustain a RICO claim.

Plaintiffs must first demonstrate: "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce." *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983). Second, plaintiff must allege that it was injured in its business or property by violation of the section. *Id.* Since plaintiffs have neither alleged predicate acts, a pattern of racketeering activity, nor a RICO enterprise, their RICO claims must fail.

1. Plaintiffs Have not Alleged Any Predicate Acts Qualifying as Racketeering Activity

Plaintiffs' conclusory allegations of predicate acts by the Foley Defendants are insufficient to demonstrate "racketeering activity." Plaintiffs' Amended Complaint includes over 300 paragraphs listing hundreds of federal and state statutes, including extortion, arson and robbery, purporting to be the predicate acts underlying their civil RICO claim, without alleging a factual basis for any of them. (AC ¶¶ 750-1062.)

Based on plaintiffs' allegations, they may be asserting mail or wire fraud as a predicate act against the Foley Defendants. (AC ¶¶ 313, 733 ¶¶ A & B, 750-1062.) But, the few facts plaintiffs have alleged fall far short of pleading the essential elements of mail and wire fraud (18 U.S.C. §§ 1341, 1343), much less with the required specificity under Rule 9(b). *Greene v. Hanover Direct, Inc., et. al.*, 06 Civ. 13308 (NRB), 2007 WL 4224372 * 4 (S.D.N.Y. Nov. 19, 2007). Plaintiffs fail to allege a scheme to defraud, the defendant's knowing or intentional participation in the scheme, and the use of interstate mails or transmission facilities in

furtherance of the scheme. *See Rosner v. Bank of China*, 528 F. Supp. 2d 419, 429 (S.D.N.Y. 2007) (internal citation and quotation omitted). In addition, where a plaintiff claims that the specific transmissions were fraudulent, Rule 9(b) requires that the complaint specify "the contents of the communications, who was involved, where and when they took place, and explain why they were fraudulent." *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir. 1993). Moreover, allegations of mail and wire fraud "must give rise to a strong inference of [fraudulent] intent" through facts establishing either "motive and opportunity or conscious misbehavior." *Greene*, 2007 WL 4224372 at *5; *see also Rosner*, 528 F. Supp. 2d at 429-430.

Here, plaintiffs' allegations fail on three counts. First, plaintiffs cannot sustain mail and wire fraud predicate acts premised on allegedly fraudulent applications filed with domestic and foreign government patent offices. *Medina v. Bauer*, 02 Civ. 8837(DC), 2004 WL 136636 *5 (S.D.N.Y. Jan. 27, 2004) (holding that complaint alleging defendants "commit[ed] a pattern of acts of mail fraud" on the patent office by misrepresenting true identity of inventor in patent applications failed to allege a predicate act for civil RICO claim.) (internal citations and quotations omitted).

Second, plaintiffs do not allege a mailing or wire transmission. (AC ¶¶ 313; 733 ¶¶ A & B.) Moreover, plaintiffs have failed to allege the when, where, who, how and why, of the allegedly fraudulent wire and mail transmissions. Specifically, plaintiffs do not allege when and where the patent applications were made, what the patent applications were for, what statements in the applications were false, who the proper inventors were, or what Iviewit Companies should have been named. (AC ¶¶ 313; 733 ¶¶ A & B.)

Finally, plaintiffs fail to allege any specific facts giving rise to a "strong inference of scienter." Plaintiffs allege no specific facts that support the Foley Defendants' role in any

"scheme" or any agreement with any other party, other than a conclusory allegation of prior bad acts and certain personal relationships (AC ¶¶ 245, 247, 250-51.) Plaintiffs allege no facts supporting any motive: the Foley Defendants are not alleged to have been involved in any patent pools, nor to have any interest in the actual IP, nor any role in setting up the so-called "illegitimate" shell companies or to know of their existence.

The remainder of the alleged predicate acts are so vague as to the Foley Defendants that a response is nearly impossible, and cannot be the basis for a "thermonuclear" claim.

2. Plaintiffs Have not Alleged a Pattern of Racketeering Activity

Because plaintiffs have failed to adequately allege any RICO predicate acts, they necessarily fail to allege a pattern of racketeering activity. *Rosner*, 528 F. Supp. 2d at 430; *Cofacredit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 243-44 (2d Cir. 1999) (actions that do not constitute predicate racketeering activity not included to determine pattern). Moreover, plaintiffs have failed to adequately allege a "pattern" of racketeering activity for the additional reason that they fail to allege any predicate acts that "are related, *and* that … amount to or pose a threat of continued criminal activity." *Cofacredit*, 187 F.3d at 242.

A plaintiff can establish a "pattern" by alleging factual assertions demonstrating either a "closed-ended" pattern or an "open-ended" pattern. Closed-ended continuity can be established by alleging a "a series of related predicates extending over a substantial period of time." *Id.* To satisfy open-ended continuity, a plaintiff must show a threat of continuing criminal activity beyond the predicate act's duration. Where the alleged enterprise "primarily conducts a legitimate business, there must be some evidence from which it may be inferred that the predicate acts were the regular way of operating that business, or that the nature of the predicate acts themselves implies a threat of continued criminal activity." *Id.* at 242-243.

Plaintiffs have not set forth any facts showing either "closed-ended" or "open ended continuity." Their vague and conclusory allegations do not show a series of related predicate acts involving the Foley Defendants extending over a substantial period of time. At most, they have only alleged facts that suggest the Foley Defendants, on one occasion, filed one (or several) patent applications with relevant agencies. (AC ¶¶ 313, 333, 335.) This simply does not establish closed-ended continuity. *Cofacredit*, 187 F.3d at 242 (in the Second Circuit, predicate acts extending over a period of less than two years do not constitute a "substantial period of time.").[5] Plaintiffs allege nothing more than conclusory allegations regarding the Foley Defendants' actions after their retention.

Nor have plaintiffs alleged a pattern of racketeering activity through an "open-ended continuity." Plaintiffs' allegations are against a reputable national law firm engaged in legitimate business, not an organized criminal enterprise, and center on a set of patent applications. There is no allegation tying Foley to any "cover-up" conspiracy. *Id.* at 242-243 (holding defendant's alleged commission of mail and wire fraud over one year insufficient and dismissing plaintiffs RICO claim for failure to establish a pattern of racketeering activity). Plaintiffs have failed to allege any facts, other than their conclusory allegations, showing the alleged acts were a regular means by which Foley conducted its business; nor, does the nature of the predicate acts imply a threat of ongoing racketeering activity.

---

[5] Plaintiffs' conclusory attempt to manufacture a pattern with a vague allegation of an earlier incident supposedly involving Mr. Dick, Mr. Utley and Mr. Wheeler should be rejected. That allegation of an earlier fraud provides no detail regarding when the alleged false application was filed, the manner in which it was filed, or what was false in the application. (AC ¶¶ 245, 246, 250.) Plaintiffs have not alleged any specific facts regarding this alleged fraud, such that it cannot be a predicate act.

3. Plaintiffs Have Not Alleged a RICO Enterprise

Plaintiffs allege that the RICO enterprise consists of the law firms of Foley and Proskauer and certain Foley and Proskauer attorneys operating under the structure of their respective law firms to "commit IP theft" and use their "legal acumen to circumvent prosecution when necessary by infiltrating the legal and judicial systems to deny due process to its victims." (AC ¶¶ 739 ¶¶ ix-xii; 749). Plaintiffs allege no facts supporting their conclusory allegations that the Foley Defendants played a role in the "cover-up" conspiracy, nor any "IP theft." A RICO enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct," the existence of which is proven "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Rosner*, 528 F. Supp. 2d at 428 (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981)) (finding plaintiffs failed to allege a RICO enterprise where plaintiffs' allegations were limited to conclusory statements and the only factual allegation tying the defendants together was that one provided "indispensable banking services" to the other.). Proskauer's recommendation to Iviewit to hire Foley provides no basis for inferring a "common unlawful purpose." *See id.* Moreover, plaintiffs do not allege how the enterprise acted as an integrated and continuing unit or the organization or hierarchy of the alleged enterprise. *Id.* at 428-429 (finding no enterprise where plaintiffs failed to provide the court "with any solid information regarding the hierarchy, organization, and activities of [the] alleged association-in-fact enterprise") (quoting *First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159, 174-175 (2d Cir. 2004).

Thus, plaintiffs' RICO claims against the Foley Defendants must be dismissed.

B. Plaintiffs' Remaining Federal Claims Are Also Deficient and Must be Dismissed

Plaintiffs' claims under the Patent Clause, the Fifth and Fourteenth Amendments, and Title VII of the Civil Rights Act of 1964, and the Sherman Act should all be dismissed

because, either there is no private right of action under those provisions or they provide no basis for why the Foley Defendants are appropriate defendants.

First, the Patent Clause, in and of itself, does not provide a right of action. Second, a plaintiff making a claim pursuant to the Fourteenth Amendment, or pursuant to 42 U.S.C. § 1983, must allege facts showing state action; and federal or other official action for claims pursuant to the Fifth Amendment. *Greene v. Berger & Montague, P.C.*, 96 CIV. 9339 (SHS), 1998 WL 99574 * 2 (S.D.N.Y. Mar. 15, 1998) (Fourteenth Amendment and 1983 claim); *Martin-Trigona v. D'Amato & Lynch,* 559 F. Supp. 533, 535 (D.C.N.Y. 1983) (Fifth Amendment claim). If the basis of plaintiffs' claim is the alleged "cover-up" conspiracy, they allege no facts regarding the Foley Defendants' role as a state actor. Third, Title VII has no bearing on the Foley Defendants' alleged relationship to plaintiffs.

Plaintiffs' claims under the Sherman Act are similarly deficient. Section 1 of the Act "forbids contracts or conspiracies in the restraint of trade or commerce and [Section] 2 addresses the actions of single firms that monopolize or attempt to monopolize, as well as conspiracies and combinations to monopolize." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 454-55 (1993) (monopolization claim requires market power and definition of relevant market). For either claim, plaintiffs must first allege "enough factual matter (taken as true) to show an agreement was made." *Twombly,* 127 S.Ct. at 1965. Plaintiffs do not. Plaintiffs must also allege facts supporting that any agreement is an "unreasonable restraint of trade" and either illegal *per se* or under the rule of reason. *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs.*, 996 F.2d 537, 542-43 (2d Cir. 1993). Plaintiffs allege no facts supporting a *per se* violation; therefore, plaintiffs must show that the "challenged action has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an

individual competitor will not suffice." *Id.* Similarly, a monopolization claim requires a definition of the relevant market and examination of market power. *Spectrum Sports*, 506 U.S. at 455. Plaintiffs allege no injury to "competition" and define no relevant market; therefore, their claims should be dismissed.

C. All of Plaintiffs' State Law Claims are Deficient and Must be Dismissed

Should this Court not find plaintiffs' state law claims are time-barred, these claims are also entirely deficient and should also be dismissed on the pleadings.[6]

1. Plaintiffs Fail To State a Claim for Common Law Fraud As They Neither Allege Scienter Nor Plead the Elements of Fraud with Particularity

Plaintiffs' fraud claim suffers from the same deficiencies as their mail and fraud claims discussed above. Plaintiffs have not alleged the elements of fraud with the specificity required by Rule 9(b). *See Mills*, 12 F.3d at 1175 (complaint must specify statements, identify the speaker, state where and when statements were made, and explain why statements were fraudulent). Nor have they alleged facts that give rise to a strong inference of fraudulent intent by showing that the defendant had both motive and opportunity to defraud or by presenting strong circumstantial evidence of conscious misbehavior. *See Greene,* 2007 WL 4224372, at *4-5.

Plaintiffs fail to allege with specificity when the patent applications were filed, what they were for, and why they were fraudulent. They do not allege the true holders of the

---

[6] A "federal court . . . adjudicating state law claims that are pendent to a federal claim must apply the choice of law rules of the forum state." *Rogers v. Grimaldi*, 875 F.2d 994, 1002 (2d Cir. 1989). Thus, New York choice of law governs this action, under which, "the first question to resolve in determining whether to undertake a choice of law analysis is whether there is an actual conflict of laws." *Fieger v. Pitney Bowes Credit Corp.*, 251 F.3d 386, 393 (2d Cir. 2001) (internal citations omitted). There is little difference between New York and Florida law concerning plaintiffs' claims and the Foley Defendants have applied New York law.

intellectual property, which Iviewit Companies should hold the patent, or which inventors were defrauded by which statement. They do not even allege which plaintiffs were defrauded. Although plaintiffs argue that the Foley Defendants were part of a conspiracy to steal plaintiffs' IP interest in the technologies, "the word 'conspiracy' does not alone satisfy the specificity requirement of Rule 9(b)." *Segal v. Gordon*, 467 F.2d 602, 608 (2d Cir. 1972). Moreover, to the extent plaintiffs claim that the Foley Defendants committed to correcting certain mistakes in the applications and failed to do so, plaintiffs' fraud allegations "amount[] to nothing but a thinly disguised claim for legal malpractice." *Tenamee v. Schmukler*, 438 F. Supp. 2d 438, 446 (S.D.N.Y. 2006) (dismissing plaintiffs' claim of fraud and holding that plaintiff could not benefit from the fraud limitations statute where its fraud claim was based on allegations that his attorney did not disclose a conflict of interest, which amounted to no more than a claim for legal malpractice).

Furthermore, as shown above, plaintiffs fail to allege that the Foley Defendants had the requisite *scienter*. Plaintiffs' have not alleged facts supporting Foley's motive and opportunity or conscious intent to defraud. *Greene*, 2007 WL 4224372 at *4-5 (plaintiff's "generalized allegations of motive, which would be imputable to any executive whose compensation comprises a performance-based component" as insufficient to warrant a strong inference of scienter). Plaintiffs also allege no facts to support a claim of conscious misbehavior. Plaintiffs' conclusory allegations simply do not suffice to infer Foley's intent to defraud. *Greene*, 2007 WL 4224372, at * 4.

2. Plaintiffs Fail to State Claims for Negligence/Malpractice or Breach of Contract Because They Do Not Allege Privity of Contract

As a preliminary matter, plaintiffs have brought this suit individually and, allegedly, on behalf of shareholders of various Iviewit entities and certain patent holders. But,

pro se plaintiffs may not represent a corporation nor appear *pro se* to pursue a shareholder's derivative suit. *Pridgen*, 113 F.3d at 393. As such, to the extent plaintiffs are suing for injuries suffered by the Iviewit entities, the law prohibits them from doing so.[7] For the reasons below, they also cannot bring a malpractice and breach of contract claim for injuries they allegedly suffered as individuals.

Plaintiffs' malpractice and negligence claims are premised on the Foley Defendants' alleged deficient performance under its retainer agreement. But, plaintiffs neither allege the existence of a contract nor an attorney-client relationship between Foley and the individual plaintiffs, a necessary element of each claim. In order to state a claim for breach of contract, plaintiffs must allege the existence of a contract, oral or written, to which they were parties. *Ross v. FSG PrivatAir Inc.*, 03 Civ. 7292 (NRB), 2004 WL 1837366, at *3 (S.D.N.Y. Aug. 17, 2004); *Raven Elevator Corp. v. City of New York*, 291 A.D.2d 355, 355, 739 N.Y.S.2d 28, 29 (1st Dept. 2002) (non-party has no standing to assert breach of contract). Similarly, to state a claim for attorney malpractice, plaintiffs must allege: an attorney-client relationship giving rise to a duty of care; breach of the duty of care; proximate cause; and, that but for the alleged malpractice, the plaintiff would have been successful in the underlying action. *Achtman v. Kirby, Mcinerney & Squire, LLP,* 336 F. Supp. 2d 336, 339 (S.D.N.Y. 2004). "New York courts impose a strict privity requirement to claims of legal malpractice; an attorney is not liable to a third party for negligence in performing services on behalf of his client." *Federal Ins. Co. v. North American Specialty Ins. Co.*, 47 A.D.3d 52, 59, 847 N.Y.S.2d 7 (1st Dep't 2007) (internal quotations and citations omitted). Here, plaintiffs do not allege which of the Iviewit Companies

---

[7] Moreover, plaintiffs have not alleged an attempt to comply with any demand requirement or reasons to be excused. Fed. R. Civ. P. 23.1.

retained Foley, much less whether individual plaintiffs Bernstein and Lamont were parties to the retention agreement. Nor do plaintiffs allege facts sufficient to show that plaintiffs would have been successful in patenting the technology, such that the alleged malpractice would have been a "but-for" cause of damages.

Moreover, plaintiffs' allegations regarding breach of contract should be dismissed for the additional reason that they are based on the same set of facts as their legal malpractice claim. *Nordwind v. Rowland*, 04-9725 (LTS/AJP), 2007 WL 2962350, at *5 (S.D.N.Y. Oct. 10, 2007) (dismissing plaintiff's breach of contract claim as duplicative of plaintiff's malpractice claim where both claims were based on same set of facts).

Accordingly, plaintiffs' malpractice and breach of contract claims must be dismissed.[8]

3. Plaintiffs' Remaining State Law Claims are Similarly Deficient and Must be Dismissed

Plaintiffs' remaining state law claims – tortious interference with advantageous business relationships, negligent interference with contractual rights, breach of fiduciary duties as directors and officers, and misappropriation and conversion of funds do not appear aimed at the Foley Defendants. However, to the extent that they are, plaintiffs have failed to allege any facts whatsoever in support of these claims. For instance, plaintiffs do not allege that any of the Foley Defendants had any role in the alleged interference or involvement in any of the contractual relationships at issue. Plaintiffs do not allege any Foley Defendants were officers or directors of any of the Iviewit Companies. Nor do they allege the Foley Defendants obtained

---

[8] To the extent plaintiffs allege fraud in support of their malpractice claims, they cannot benefit from a relaxed privity requirement because, as discussed above, plaintiffs' fraud allegations are conclusory and fail to satisfy the heightened pleading requirement of Rule 9(b).

any funds or even held property as required for a conversion claim. Therefore, these claims must be dismissed.

In addition, plaintiffs list a multitude of statutes and assert "other" New York, Florida and Delaware state claims against "defendants," that are conclusory and subsumed in their other claims. Accordingly, all of these claims must also be dismissed, as they fail to provide the notice required by Fed. R. Civ. P. 8.

CONCLUSION

For the foregoing reasons, this action should be dismissed in its entirety against Foley & Lardner LLP, Douglas A. Boehm, Steven C. Becker, William J. Dick and Michael W. Grebe.

Dated: New York, New York
May 30, 2008

Respectfully submitted,

FRIEDMAN KAPLAN SEILER &
ADELMAN LLP

Kent K. Anker
Lili Zandpour
1633 Broadway
New York, NY 10019-6708
(212) 833-1100

Attorneys for Defendants Foley & Lardner LLP, Steven C. Becker, Douglas A. Boehm, William J. Dick, and Michael W. Grebe